No. 06-984

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

BRIEF *AMICUS CURIAE* OF FORMER SENIOR OFFICIALS OF THE DEPARTMENT OF JUSTICE IN SUPPORT OF RESPONDENT

CHARLES J. COOPER
Counsel of Record
BRIAN STUART KOUKOUTCHOS
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Amicus the Honorable Edwin Meese III served as the 75th Attorney General of the United States and is now the Ronald Reagan Distinguished Fellow in Public Policy and Chairman of the Center for Legal and Judicial Studies at the Heritage Foundation. *Amicus* the Honorable Dick Thornburgh served as the 76th Attorney General of the United States and as Under-Secretary-General of the United Nations. He had previously served two terms as Governor of the Commonwealth of Pennsylvania and currently serves as counsel to Kirkpatrick & Lockhart Preston Gates Ellis LLP. *Amicus* the Honorable Charles Fried is former Solicitor General of the United States and former Associate Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts. He is now Beneficial Professor of Law at Harvard Law School. *Amicus* the Honorable Timothy Flanigan is former Assistant Attorney General for the Office of Legal Counsel and former Deputy White House Counsel. *Amicus* the Honorable Douglas W. Kmiec is former Assistant Attorney General for the Office of Legal Counsel and former Dean, The Catholic University of America School of Law. He is now Chair and Professor of Constitutional Law at Pepperdine University. *Amicus* the Honorable Charles J. Cooper is former Assistant Attorney General for the Office of Legal Counsel and is also counsel of record for *amici* here.[1] Although *amici* are strong advocates for a robust vision of presidential power in foreign affairs, *amici* do not believe that the positions taken in this case by Petitioner and *amicus* United States

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[1] Counsel for *amici* authored this brief. No person other than counsel or *amici* made a monetary contribution to its preparation or submission. S.Ct. Rule 37.6. All parties have consented to the filing of this brief.

can be reconciled with the separation of powers and the principles of federalism embodied in the Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is controlled by *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), and *Breard v. Greene*, 523 U.S. 371 (1998) (*per curiam*), in which the Court held that claims to consular access under Article 36 of the Vienna Convention are subject to the same procedural default rules applicable to other federal statutory and constitutional rights guaranteed to a criminal defendant. Petitioner Medellin asserts rights of consular access under Article 36 as interpreted by the International Court of Justice ("ICJ") in *Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 1 (Mar. 31) – the very decision that this Court rejected in *Sanchez-Llamas*.

Medellin insists that there is no conflict between *Avena* and *Sanchez-Llamas* because he was one of the 51 particular Mexican nationals whose cases were before the ICJ in *Avena*. Medellin thus invokes *Avena* not as an authoritative precedent that this Court is bound to follow in applying Article 36, but rather as *res judicata* – a final judgment by the ICJ in Medellin's own case that, supposedly, binds this Court on a matter of United States law. With respect to Medellin, we are told, the ICJ has already determined his rights under Article 36, and in that respect this Court is subordinate to the ICJ and not the "one supreme Court" described in Article III of the Constitution.

The Solicitor General argues that the ICJ's *Avena* decision misreads Article 36, but nonetheless asserts that the President, under his Article II foreign-relations power and the relevant treaties, has authority to preempt state law and to order the Texas Court of Criminal Appeals to ignore this Court's construction of Article 36 in *Breard* and *Sanchez-Llamas*, and instead to give effect to the *Avena*

decision that this Court repudiated. Application of the analytical framework set forth in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) ("*The Steel Seizure Case*"), makes clear that the President has no such authority, for the President's power is at low ebb when he acts in conflict with a congressionally enacted law. Here, the Article I branch, in the form of the Senate, has ratified a treaty and thereby enacted the supreme law of the land for the President to enforce: the Vienna Convention and its requirement that consular rights be implemented "in conformity with" the law of the forum state. And this Court, the head of the Article III branch, has given that law an authoritative construction contrary to the President's reading. Thus, the President here acts in contravention of the very treaty he invokes.

The Solicitor General's contention that the President may preempt Texas laws of criminal procedure by exercise of the foreign-affairs power inherent in Article II is likewise unavailing. Whatever the extent of that power, it does not extend to overriding this Court's interpretation of a treaty, nor to unilateral presidential preemption of state law.

The Solicitor General also invokes the President's power to resolve international reparations claims involving foreign sovereigns. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). But there is nothing remotely like that here. This is not a case of an individual claimant in Texas reaching overseas in an attempt to apply Texas law to a foreign government or foreign corporation for alleged torts that occurred in a foreign land. This case involves a Texas criminal court applying Texas criminal procedures to Texas judicial proceedings governing a Texas prosecution

of a foreign national who committed heinous criminal acts in Texas against Texas residents. Thus, here Texas acts within the irreducible core of State sovereignty: the criminal law. Nothing in this Court's precedents cedes to the President power to displace state law – especially not state laws that are expressly preserved by a treaty ratified by the United States Senate, in which each sovereign State is assured equal and perpetual representation.

The Solicitor General's remaining arguments amount to little more than an appeal to "efficiency" of the sort that this Court has consistently rejected. Neither federalism nor the separation of powers was instituted with the idea that it would promote governmental efficiency. Those principles are instead bulwarks against tyranny.

ARGUMENT

I. PETITIONER CANNOT ESCAPE THE CONTROLLING AUTHORITY OF *SANCHEZ-LLAMAS*.

Petitioner Medellin asserts rights of consular access under Article 36 of the Vienna Convention, contending that when the United States ratified the Convention's Optional Protocol, it agreed to submit disputes arising out of the Convention to the ICJ, and that when it ratified the United Nations Charter ("U.N. Charter"), the United States agreed to comply with any ICJ decision to which it was a party. Pet. Br. 19-20.[2] In *Avena*, the ICJ interpreted Article 36 to preempt state rules of criminal procedure under which criminal defendants such as Medellin forfeit rights if they fail to assert them during trial and appeal.

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[2] The brief for Petitioner Medellin will be cited as "Pet. Br." The brief of *amicus curiae* United States will be cited "U.S. Br."

Pet. Br. 8-9. Mexico brought the *Avena* action to obtain enforcement of Article 36 with respect to 51 Mexican nationals who had been sentenced to death by state courts, including Medellin himself, who confessed to raping and then murdering two teenage girls in Texas. Petitioner contends that the Texas court below, and this Court, too, are bound by *Avena* because the treaties listed above are the supreme federal law of the land under the Supremacy Clause of Article VI of the Constitution. Pet. Br. 21, 23-28.

Petitioner's argument runs headlong into *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), where this Court expressly repudiated *Avena*'s interpretation of those treaty requirements. The Court ruled that the question whether Article 36 requires preemption of state procedural default rules "is controlled by our decision in *Breard v. Greene*, 523 U.S. 371 (1998) (*per curiam*)." 126 S. Ct. at 2682. The background rule of international law – which neither Petitioner nor the United States disputes – is that, "'absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.'" *Id.* at 2682-83 (quoting *Breard*, 523 U.S. at 375). Neither Petitioner nor the United States has identified any such express statement in any of the treaties here. Indeed, Article 36 expressly provides precisely the opposite: the rights it confers "'shall be exercised in conformity with the laws and regulations of the receiving State.'" *Sanchez-Llamas*, 126 S. Ct. at 2685 (quoting the treaty). Thus, by the explicit terms of the treaty that Petitioner invokes, state procedural default rules continue to govern. *See id.* at 2680, 2685; *Breard*, 523 U.S. at 375.

Medellin recognizes that *Sanchez-Llamas*, decided just a year ago, is a profound embarrassment for his

argument. Pet. Br. 21-22. Petitioner therefore contends that this Court's rejection of *Avena*'s reading of the treaties is irrelevant because, "[u]nlike the petitioners in *Sanchez-Llamas*, Medellin is a national of Mexico whose case was specifically adjudicated in *Avena*, and the United States is indisputably bound 'in respect of [his] particular case.'" Pet. Br. 22. Thus, according to Petitioner, the "issue is not the effect of the ICJ's *interpretation* as a *precedent*, but the effect of the ICJ's *decision* as a *judgment*." *Id.* (original emphasis). Despite the fact that this Court rejected *Avena* in *Sanchez-Llamas*, *Avena* supposedly governs Medellin's case because *Avena* is "a valid final judgment that is binding on the United States by treaty." *Id.* Petitioner contends, therefore, that his treaty rights have been authoritatively adjudicated by the ICJ, that they are *res judicata*, and that the final judgment of the ICJ is not subject to question in this Court. *Id.* Even though this Court rejected *Avena*'s reasoning and conclusion, it must nevertheless enforce the *Avena* judgment in favor of Medellin, because the ICJ's decision on this question of United States federal law is binding on this Court.

Petitioner's argument works only if the ICJ is a tribunal superior to this Court on matters of federal law, and we know that is not so. As Justice Jackson memorably remarked in an earlier *habeas corpus* case, "[t]here is no doubt that if there were a super-Supreme Court, a substantial portion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). Only a "super-Supreme Court" could reverse this Court's authoritative construction of Article 36 in *Sanchez-Llamas* and *Breard*, and neither the ICJ nor any other tribunal qualifies for that role. In fact, the Court appears to have

anticipated (and dismissed) Medellin's argument in *Sanchez-Llamas*:

> Under our Constitution, "the judicial Power of the United States" is "vested in one supreme Court" . . . Art. III, § 1. That "judicial Power . . . extends to . . . Treaties." . . . If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court" established by the Constitution.

126 S. Ct. at 2684 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). "It is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ." *Id.* And "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." *Id.*

The Senate and the President cannot, by treaty, rewrite Article III to subordinate this Court to an international tribunal convened by the U.N. *See Clinton v. New York*, 524 U.S. 417, 445-46 (1998) ("Congress cannot alter the procedures set out in Art. I, § 7 without amending the Constitution."). But the Court need not address this constitutional issue because it is clear that the treaties Petitioner invokes did not intend to subordinate this Court to the ICJ. As this Court observed in *Sanchez-Llamas*, the treaties neither envision nor provide judicial remedies for violation of consular rights. *See* 126 S. Ct. at 2680. Neither party here – not Petitioner nor the State of Texas – was a party in *Avena*. Indeed, the ICJ only "arbitrate[s] particular disputes between national governments," and enforcement

is exclusively by diplomatic means such as "referral to the Security Counsel." *Id.* at 2684-85. Thus the treaty contemplates exclusively and "quintessentially *international* remedies." *Id.* at 2685 (original emphasis).

Petitioner asks this Court to order the Court of Criminal Appeals of Texas "to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed." Pet. Br. i. But this Court has already held that those treaties impose *no such obligation*: "procedural rules of domestic law generally govern the implementation of an international treaty," and "Article 36 makes clear that the rights it provides 'shall be exercised *in conformity with* the laws'" of the forum State. *Sanchez-Llamas*, 126 S. Ct. at 2685 (emphasis added). "[T]his means that the [Texas] rule of procedural default – which applies even to claimed violations of our Constitution – applies also to the Vienna Convention claims." *Id.*

Although the ICJ's "decisions" have "'no binding force except between the parties and in respect of that particular case,'" *id.* at 2684 (quoting the treaty; emphasis deleted), the same is *not* true of this Court's decisions. In *Sanchez-Llamas*, the Court did not announce a rule for that case alone.

II. THE PRESIDENT'S ASSERTION OF POWER TO PREEMPT STATE PROCEDURAL LAW IN DEFIANCE OF THE EXPRESS TERMS OF THE VIENNA CONVENTION VIOLATES THE SEPARATION OF POWERS.

The argument of *amicus curiae* United States likewise seeks to evade *Sanchez-Llamas* by focusing just on the

"cases filed by the 51 Mexican nationals addressed in that decision." U.S. Br. 3. The Solicitor General agrees that *Avena* misinterpreted the obligations of the United States under the treaty (*id.* at 27-29), but states that the President has nevertheless chosen, for diplomatic reasons, to comply with *Avena* "by having State courts give effect to the decision in accordance with general principles of comity." *Id.* at 3. The President's order directing State courts to ignore controlling decisions of this Court is an exercise, according to the Solicitor General, of the President's foreign-affairs power to decide how the nation will comply with treaty obligations. U.S. Br. 8-9, 10-11. The Solicitor General offers several different theories for the President's supposed judicial authority, but none of them has merit.

A. The President Has No Treaty-Based Power To Countermand Treaty Interpretations By This Court And To Preempt State Law.

The Solicitor General first asserts presidential power to preempt state law pursuant to treaty, and observes that, although this Court "has not specifically addressed how to assess presidential action under the authority of a treaty . . . it seems clear that when the President acts pursuant to a duly ratified treaty . . . his authority is at its zenith." U.S. Br. 10 (citing *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). It is equally clear that presidential power is at its *nadir* "[w]hen the President takes measures incompatible with the expressed or implied will of Congress." *The Steel Seizure Case*, 343 U.S. at 637 (Jackson, J., concurring). As Justice Black wrote for the Court in that seminal case,

"[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Id.* at 585. Here, as in *Steel Seizure*, "[t]here is no statute that expressly authorizes the President" to overrule treaty interpretations by this Court and to preempt state law, "[n]or is there any act of Congress . . . from which such a power can fairly be implied." *Id.* Those statements are equally true if applied to treaties rather than statutes.[3]

The Solicitor General cites two sources of the President's supposed power to preempt state law and compel state courts to ignore controlling authority of this Court: (1) the Vienna Convention's Optional Protocol, in which the United States agreed to submit disputes over the interpretation of Article 36 to the ICJ, and (2) the U.N. Charter, in which the United States agreed to comply with decisions of the ICJ. U.S. Br. 8. But those provisions describe, at most, the procedural apparatus for *diplomatic* enforcement of obligations under the Vienna Convention. They do not impose any substantive treaty obligation, let alone any treaty obligation that purports to preempt state law or to deputize the President as a super-Supreme Court.[4]

It is quite telling that the Solicitor General fails to address those portions of the Vienna Convention that do impose substantive obligations on the United States. The

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[3] It goes without saying that a treaty properly ratified by the Senate has the same status as an Act of Congress under Article VI of the Constitution.

[4] As *Sanchez-Llamas* held, these treaty provisions do not make ICJ decisions "conclusive on our courts." 126 S. Ct. at 2684. Rather, the treaties "contemplate[] quintessentially *international* remedies," such as referral to the U.N. Security Council. *Id.* at 2685 (original emphasis).

Court held in *Sanchez-Llamas* that the Vienna Convention does not set aside the procedural rules that govern implementation of the treaty in the forum state, absent an explicit statement to the contrary. 126 S. Ct. at 2682-83. Instead, the Convention expressly requires that Article 36 rights be enforced *only* "'in conformity with the laws'" of the receiving state. *Id.* at 2680. Indeed, the Court stressed this point repeatedly. *See id.* at 2678, 2685, 2686. The Court therefore held that the Vienna Convention does not preempt state procedural default rules, *id.* at 2687, and accordingly provides no basis for the Court to direct preemption and thereby expand United States obligations under the treaty, *id.* at 2679, 2687.

But the Solicitor General defends presidential power to preempt state procedural default rules in compliance with *Avena*, despite this Court's decisions rejecting *Avena* and holding that the Vienna Convention forbids displacement of state procedural rules. U.S. Br. 8-9. The President may be free, as a matter of international diplomacy, to defer to the ICJ's misreading of Article 36. But the President's supposed power pursuant to the Vienna Convention to preempt state law is limited by the actual terms that the Senate ratified: the "United States ratified the Convention with the expectation that it would be interpreted according to its terms." *Sanchez-Llamas*, 126 S. Ct. at 2679.[5] And the terms that the United States ratified

[5] As the Solicitor General himself argued when *Medellin* was before this Court the first time, the Vienna Convention was ratified on the express understanding that it did not "change or affect present U.S. laws or practice." Brief *Amicus Curiae* of the United States in No. 04-5928, *Medellin v. Dretke*, at 21-22 ("The Senate Foreign Relations Committee . . . cited as a factor in its endorsement of the treaty that '[t]he Convention does not change or affect present U.S. laws or practice.'" (quoting S. Exec. Rep. No. 9, 91st Cong. at 2 (1969)).

expressly mandate enforcement of Article 36 "*in conformity with*" state procedural rules. *Id.* at 2685 (emphasis added).

Therefore, there is no authority for the President to preempt state law under the Vienna Convention because displacement of state law is "not only unauthorized by any [treaty]" – it is in fact *proscribed* by treaty. *Steel Seizure*, 343 U.S. at 586. *See also id.* at 602 (Frankfurter, J., concurring) ("It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation. Congress has expressed its will to withhold this power from the President as though it had said so in so many words."); *id.* at 635-36 n.2 (Jackson, J., concurring) (This Court has "intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.").

Although the Solicitor General relies on *Steel Seizure*, that case is his undoing, for the Vienna Convention, as authoritatively construed in *Sanchez-Llamas* and *Breard*, limits the means and manner by which the President may implement United States obligations under that treaty. As Justice Frankfurther explained in *Steel Seizure*, "[i]t is quite impossible . . . when Congress did specifically address itself to a problem, . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld." 343 U.S. at 609 (concurring opinion).

B. The President Has No Inherent Foreign-Relations Power To Override This Court's Interpretations Of Treaties Nor To Preempt State Law.

All parties and *amici* agree on this:

> When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Steel Seizure, 343 U.S. at 637-38 (Jackson, J., concurring). *See* Pet. Br. 35; U.S. Br. 9-10. Here, as in *Steel Seizure*, "it is not claimed that express constitutional language grants" the President power to reverse this Court's judicial construction of a treaty and to preempt state law; "[t]he contention is that presidential power should be implied from the aggregate of his powers under the Constitution." 343 U.S. at 587. To sustain this claim, the Court would have to hold that power to preempt state law is – as Justice Jackson put it – "within [the President's] domain and beyond control by Congress." *Id.* at 640 (concurring opinion).

As explained above, however, the limit on presidential power to preempt state procedural rules is imposed by the express terms of the Vienna Convention – the Senate ratified a treaty that mandates implementation of Article 36 "in conformity with" state law. To hold that the Senate

cannot limit its consent to a treaty by ratifying its express terms, and that the President is free to ignore the treaty terms ratified by the Senate because foreign relations is "within his domain and beyond control by Congress," *id.*, is to displace the Senate's explicit constitutional authority to give *or withhold* consent to a treaty. *See* Art. II, § 2.

Indeed, the President's power in this case is at a far lower ebb than in *Steel Seizure*. Here, as there, the Article I branch (the Senate) has spoken in a treaty to the issue before the Court (here, the limits of federal preemption of forum state procedural law). But unlike *Steel Seizure*, here the Article III branch has already definitively interpreted that treaty with respect to that precise issue of compliance with state rules of procedural default. *See Breard*; *Sanchez-Llamas*. There is no presidential power to preempt state law in defiance of the terms of a treaty as authoritatively interpreted by this Court. Such a power cannot possibly be "inherent" in Article II, because any such reading of Article II is precluded by the express terms of Article III, which vests "the judicial Power of the United States . . . in one supreme Court." "If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court.'" *Sanchez-Llamas*, 126 S. Ct. at 2684.

C. The President Has No "Independent Authority" To Preempt State Law In The Course Of Resolving Disputes With Foreign Nations.

The Solicitor General argues that the President has "long established authority to resolve disputes with foreign

nations . . . involving international claims." U.S. Br. 12-15. *See also* Pet. Br. 35-37 (making a similar argument). But all of the authorities adduced for this proposition involved international reparations claims against foreign sovereigns or other foreign entities. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 405 (2003); *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981); *United States v. Pink*, 315 U.S. 203, 227 (1942); *United States v. Belmont*, 301 U.S. 324, 326 (1937). There is nothing remotely like that here. This is not a case of an individual claimant in Texas reaching overseas and trying to apply Texas law to a foreign government or foreign corporation for alleged torts that took place overseas. This case involves a Texas criminal court applying Texas criminal procedures to Texas judicial proceedings governing a Texas prosecution of a foreign national who committed heinous criminal acts in Texas against Texas residents.

The Solicitor General's own principal authority, *American Ins. Ass'n v. Garamendi*, *see* U.S. Br. 13-15, 23, 25, distinguishes his cases and defeats his argument. The Court there identified the strength of the state's interest as a crucial factor in analyzing whether the President could preempt the state's law. *See* 539 U.S. at 419-20. *Garamendi* involved a California insurance-company disclosure statute. The Court acknowledged the importance of the state's general interest in "consumer protection," but the disclosure law was not "a generally applicable" consumer-protection law, but was instead a law that "single[d] out only policies issued by European insurance companies, in Europe, to European residents, at least 55 years ago." *Id.* at 425-26. The challenged law ordered the disclosure by the European companies of information about the policies they had issued to European policyholders who died in the Holocaust. *Id.* In that

historical, overseas scenario, the Court found California's highly attenuated regulatory interest to be quite "weak." *Id.* at 425.

In contrast, the Texas procedural default rule at issue here applies to all criminal defendants in Texas, not just foreign nationals, and governs all assertions of rights by defendants – not just consular rights, but also state and federal constitutional rights. And the Texas rule is being applied not to events that happened on the other side of the world half a century ago, but to a Texas criminal prosecution involving brutal crimes of violence – gang rape and murder – recently committed in Texas against Texas residents – a pair of teenage girls. With all of these distinctions, it is hard to imagine how this case could be less like the Solicitor General's cases involving international claims reparations.

In *Garamendi*, this Court ruled that a state's interest in applying forum law to foreign litigants and foreign events is to be considered under "general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction." 539 U.S. at 426.[6] What could possibly be more appropriate and more familiar than for a state to apply its own criminal laws to crimes committed within its borders by its own residents against its own citizens? It is beyond cavil that the "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (citation omitted). With respect to the

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[6] The *Garamendi* Court indicated that "[w]here . . . a State has acted within . . . its 'traditional competence,' but in a way that affects foreign relations, it might make good sense to require a conflict of a clarity or substantiality that would vary with the strength for the traditional importance of the state concern asserted." *Id.* at 419 n.11.

federal-state balance struck by the Constitution, there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000). *See Bartkus v. Illinois*, 359 U.S. 121, 137 (1959) (denouncing an invasion of State criminal authority that "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines").

Unsurprisingly, neither Petitioner nor *amicus* United States has identified *any* history of presidential orders, or congressional acquiescence therein, invoking the foreign-relations power to preempt application of state procedural law by state criminal courts to crimes committed within that state against the state's people. Petitioner offers two cases that, he says, define a "long and uninterrupted line of cases" in which this Court has applied treaties, "even if those treaties conflict with state law in areas of traditional state concern." Pet. Br. 28. But Petitioner's authorities are irrelevant to this case, where the President purports to preempt state law *not* pursuant to a treaty, *but despite this Court's ruling that the relevant treaty expressly preserves, rather than displaces, state law. See Breard*; *Sanchez-Llamas*.[7]

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[7] Petitioner cites *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and *Wildenhus's Case*, 120 U.S. 1 (1887). But *Worcester* struck down an application of Georgia criminal law not because it was in conflict with a presidential order, but because it was "repugnant to the Constitution, laws and treaties of the United States." 31 U.S. at 561. That is not this case. Petitioner's reliance on *Wildenhus* is even more baffling: the Court refused a writ of *habeas corpus* sought by the Belgian consul because the murder that Wildenhus was accused of took place in a New Jersey port and threatened public order, and was therefore, the Court held,

(Continued on following page)

This case is further distinguishable from *Garamendi* and its predecessors in other respects. In *Garamendi*, the federal government made an extensive showing of the disruption of United States foreign policy that would ensue if California's law, specially enacted to apply to a single class of foreign companies and foreign insurance policies, were applied to regulate overseas transactions by overseas parties 55 years ago. Neither the Solicitor General nor the Petitioner makes any such demonstration here, nor could they. At issue is a general law of criminal procedure applied to all *habeas corpus* petitions in the Texas courts. There are no extraterritorial parties; there is no extraterritorial operation of Texas law. Moreover, this Court has already held that the application of such procedural default rules by state courts is no disrespect to the Vienna Convention, because the relief that Petitioner and the Solicitor General demand – suspension of Texas' procedural default rule – would be "extraordinary" relief "that is accorded to almost no other right, including many of our most fundamental constitutional protections." *Sanchez-Llamas*, 126 S. Ct. at 2687-88. Therefore, "[i]t is no slight to the Convention to deny petitioners' claims under the same principles we would apply to an Act of Congress, or to the Constitution itself." *Id.* at 2688.

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properly within local jurisdiction pursuant to the treaty in question. 120 U.S. at 17-18.

Petitioner also cites several cases that he characterizes as involving federal "treaties" that preempt state business regulation, property law, or tort law. *See* Pet. Br. 28 & 14. Insofar as they affirm preemption of local law by a *treaty*, the cases have no bearing on this case, where the President's assertion of power to preempt state law *contravenes* the treaty in question. Furthermore, like *Garamendi*, these cases distinguish themselves from the vital state interest in its own criminal law that is at issue here.

Indeed, it is hard to imagine how the action of the Texas court below could possibly give any discernible further affront to the Vienna Convention and the ICJ, given that: (1) this Court has already rejected the ICJ's construction of the treaty, (2) the President himself has denounced the *Avena* decision as incorrect, (3) the President has repudiated *Avena* as non-binding on United States courts, and (4) the President has announced that the United States no longer recognizes the ICJ's jurisdiction. *See id.* at 2685.

As the foregoing discussion makes clear, a presidential order that preempted state law and directed state courts to disregard decisions of this Court would raise grave constitutional issues of separation of powers and federalism. However, the Court need not venture down that path, because it is doubtful that the President in fact issued any such edict. The Solicitor General does not characterize the President's action as an "executive agreement" with foreign nations or even as a unilateral executive "order." The strongest term that the Solicitor General, the Petitioner, or even the President himself can offer is "determination" (U.S. Br. 3; Pet. Br. 10):

> "I have determined . . . that the United States will discharge its international obligations under the decision of the [ICJ] in [*Avena*] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."

Pet. Br. 10 (quoting the President's statement).

To begin with, this "determination" is a unilateral act, not a solemn international "executive agreement" of the sort to which the Court emphasized deference in *Garamendi* and its ilk. *See Garamendi*, 539 U.S. at 406 n.2,

407, 408 & n.3, 413, 421; *Dames & Moore*, 453 U.S. at 665, 679, 682-83; *Pink*, 315 U.S. at 223, 230-31; *Belmont*, 301 U.S. at 326, 330-31.

Second, this "determination" is merely an internal memorandum within the executive branch. The difference between "Executive Branch actions," "*amicus* filings," "pronouncements," "letters," "decisions," and sundry other "statements" of executive policy on the one hand, and "legally binding executive agreements" on the other, is that the latter, but not the former, are meant to have the force of law. *Barclays Bank v. Franchise Tax Bd.*, 512 U.S. at 328-29 & n.30 (1994). Even if the form of a presidential action is not necessarily dispositive, it is undeniable that the President's "determination" here does not display any of the indicia that usually accompany an executive order that is intended to have the force of law. And before the Court decides serious constitutional issues raised by an executive action, it should first ascertain whether the President's action was truly meant to be law. "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional [a State's] otherwise valid" rule. *Barclays*, 512 U.S. at 330.

Third, although the President's "determination" does address *Avena*, it does *not* say that Texas procedural default rules are preempted – nor does it even imply that. Only the Solicitor General's *amicus* brief asserts preemption, and *amicus* briefs that urge a particular result are not a sufficient basis for a court to infer an executive order that is meant to bind. *Id.* at 329-30. The President's "determination" itself speaks only of "having State courts give effect to the decision *in accordance with general principles of comity*" – and "comity" is the hedge. Pet. Br. 10 (emphasis added).

Comity is "the courtesy of nations." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 543 n.27 (1987) (citations omitted). It is a policy of courtesy and cooperation, rather than "a matter of absolute obligation." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). The application of foreign law as a matter of "'comity is, and ever must be, uncertain,'" and "'no nation will suffer the laws of another to interfere with her own.'" *Id.* at 164 (quoting JUSTICE STORY, STORY'S CONFLICT OF LAWS § 28) (internal citation omitted).[8] Therefore, the President's explicit qualification of the state courts' consideration of *Avena* as deriving from "general principles of comity" means that those courts remain free to reject *Avena* if it prejudices the state's interests or conflicts and interferes with their own rules – which is precisely what the court below did. The President's invocation of the "ever . . . uncertain" rule of international comity as the basis for applying *Avena* renders the President's determination "merely precatory." *Barclays Bank*, 512 U.S. at 330.

Futhermore, the President's "comity" hedge should be considered in light of his simultaneous decisions: (1) to reject the *Avena* decision as incorrect, (2) to repudiate *Avena* as non-binding on U.S. courts, and (3) to disavow the jurisdiction of the ICJ. *See Sanchez-Llamas*, 126 S. Ct.

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[8] *See also Hilton v. Guyot*, 159 U.S. at 165 ("'[I]n the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the court, which decides, will prefer the laws of its own country to that of the stranger.'"); *id.* at 165 ("'It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests.'") (citation omitted); *id.* at 166 ("'There is no obligation . . . to regard foreign laws; but their application is admitted, only from considerations of utility and the mutual convenience of States – *ex comitate, ob reciprocam utilitatem*.'") (quoting WHEATON'S INTERNATIONAL LAW (8th ed.) § 79).

at 2685 ("[I]t is doubtful that our courts should give decisive weight to the interpretation of a tribunal whose jurisdiction in this area is no longer recognized by the United States."). Similarly, the President's "determination" in 2005 to have state courts apply *Avena* in accord with comity must be understood in light of this Court's controlling decision in *Breard* in 1998 that Article 36 does not displace state-court rules of procedural default. *See Sanchez-Llamas*, 126 S. Ct. at 2682-83. Thus, the President instructed state courts to consider (under the discretionary and non-binding policy of comity) a decision (that the President has denounced) of a foreign tribunal (that the United States no longer recognizes) enforcing a treaty on consular rights that had already been authoritatively interpreted by this Court to conflict with, and to have no impact on, state-court rules of procedural default. Characterizing the President's *Avena* "determination" as merely precatory almost seems to overstate its significance.

D. The Solicitor General's Remaining Arguments Are Unpersuasive.

Amicus United States offers a grab-bag of additional arguments to "inform" the Court's understanding of the President's preeminent role in foreign affairs. U.S. Br. 11-12, 16-21. The Solicitor General stops short of contending that these bases in themselves actually authorize the President to preempt state law and to order state courts to defy the decisions of this Court. This is prudent, because the only illumination that these arguments really cast on this case reveals just how unprecedented and illegitimate the President's action truly is.

1. The President's assumption of responsibility for responding to ICJ decisions proves nothing.

The Solicitor General contends that, historically, the President has determined how the United States responds to decisions of the ICJ. The only authority offered is a *cf.* citation to a sentence fragment from *Dames & Moore* that supposedly finds relevance in "a 'history of congressional acquiescence' in presidential authority." U.S. Br. 19 (quoting *Dames & Moore*, 453 U.S. at 678). What the Court actually said, in the rest of the sentence that the Solicitor General omits, is that "[a]t least this is so [1] *where there is no contrary indication of legislative intent* and [2] when, as here, there is a history of congressional acquiescence *in conduct of the sort engaged in by the President*." 453 U.S. at 678 (emphasis added).

Taking the second caveat first, the "conduct" in which the President has engaged here is preempting a Texas procedural-default rule and ordering the Texas courts to ignore a controlling decision by this Court. The Solicitor General proffers *not even one* prior historical example of *that*, let alone a "history" of congressional acquiescence in such presidential usurpations of both legislative and judicial power. Thus *Dames & Moore* subverts, rather than supports, the Solicitor General.

The other caveat is that a history of like executive actions is relevant "where there is no contrary indication of legislative intent." 453 U.S. at 678. That distinguishes this case as well, for the Legislative Branch (the Senate) clearly indicated, in the language of the Vienna Convention itself, that the consular rights of Article 36 were to be implemented "in conformity" with local law, including local procedural laws. *Sanchez-Llamas*, 126 S. Ct. at 2685. Thus

Dames & Moore, the Solicitor General's sole authority, defeats his argument.

Furthermore, the four ICJ cases that the Solicitor General cites as defining a history of congressional acquiescence in presidential responses to the ICJ are entirely beside the point. *See* U.S. Br. 19-20. In *none* of those cases did the President take any action that raised any question that he was exceeding his lawful authority, whether by preempting state law or otherwise. Indeed, none of the cases even involved any domestic orders by the President at all.[9]

The *LaGrand Case* (*F.R.G. v. U.S.*), 2001 I.C.J. 466 (June 27), is the most revealing of the Solicitor General's examples, because it involved Article 36. The ICJ ruled that the United States had violated the treaty and must allow reconsideration for defendants denied their consular rights. The President, as here, determined that the ICJ's judgment was not binding but then, rather than trying to preempt state law, the President merely sent state governors, parole boards and clemency boards precatory letters "encouraging them" to consider the lack of consular notification. U.S. Br. 20-21. Thus the case presented no issue of presidential intrusion on state (or federal judicial) authority because the President did *not* attempt to intervene in state "avenues for judicial review" nor presume to preempt the "domestic law" governing such proceedings. U.S. Br. 20. Would that the President had taken the same course here.

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[9] In the Nicaraguan case, the President ignored the ICJ's decision and took no domestic action whatever. *See* U.S. Br. 20. In the case involving Maine, the ICJ resolved a boundary dispute in international waters and the President's sole response was to tinker with international maps. *Id.*

Congressional "acquiescence" in executive responses to ICJ decisions that were devoid of domestic impact proves, at most, that Congress is not troubled when the President does not do anything. Contrary to the Solicitor General's suggestion, this sort of "acquiescence" does not amount to a congressional license for the President to ignore a decision of this Court or to preempt state law – especially not in the face of a Senate-ratified treaty specifying that state law is not to be displaced.[10]

2. The President's possession of other responsibilities "related" to the authority he claims here proves nothing.

The Solicitor General finds it "[o]f particular importance" that Congress has authorized the President to direct functions connected with United States participation in the UN and the ICJ (U.S. Br. 16), and has given the President broad authority to obtain the release of citizens detained abroad. U.S. Br. 17; *see also* Pet. Br. 39-41. The only case authority offered is, again, another *cf.* citation to the same page of the *Dames & Moore* opinion: "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion

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[10] The Solicitor General does not even bother to discuss his fourth ICJ case or the President's reaction to it. U.S. Br. 19 n.4. The President's actions there apparently raised no issue of the Executive exceeding his authority with respect to the Judiciary or the States because the dispute before the ICJ involved U.S. consular jurisdiction in Morocco and the immunity of U.S. nationals from Moroccan laws and taxes. *See Case Concerning Rights of Nationals of the United States in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 212-13 (Aug. 27).

may be considered to 'invite'" presidential action in related areas. 453 U.S. at 678. *See* U.S. Br. 16.

Once again, the Solicitor General omits the two caveats contained in the next sentence. *See* Part II.D.1., *supra*. First, congressional grants of broad presidential power in related areas "invite" presidential exercises of discretion *except* where, as here, there is a contrary indication of congressional intent – again, the express language of the treaty mandating enforcement of Article 36 "in conformity with" local law. The second condition is likewise absent: there is no history of congressional acquiescence in presidential orders preempting state procedural laws or ordering state courts to ignore a controlling decision by this Court. As before, the Solicitor General is unable to adduce even a single example for the President's unprecedented usurpation of judicial and state authority.

Furthermore, nothing in the two statutes cited by the Solicitor General even vaguely hints that the President is authorized to order state courts to ignore a controlling decision of this Court or to preempt state criminal law whenever the President believes that doing so would advance United States relations with some foreign country. Indeed, the Solicitor General concedes that these statutes do not even "authorize the President to implement an ICJ decision." U.S. Br. 17.

3. The President's role in litigation that implicates foreign policy proves nothing.

The Solicitor General contends that the President has an "established role in litigation implicating foreign-policy concerns" and that the President has sometimes "exercised authority to determine whether an international rule of

law should be applied in domestic courts." U.S. Br. 17; *see also* Pet. Br. 29-30, 33. The leading example offered is the President's *former* role in deciding whether a foreign nation received sovereign immunity in American courts. U.S. Br. 17. But as the United States concedes, that ended more than 30 years ago. *Id.* Furthermore, that *ancien regime*, as the Solicitor General's own authority explains, involved the courts deferring not to the President, but to the "decisions of the political *branches*" – that is, to the Legislative and Executive Branches together. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (emphasis added).

Indeed, the Executive's former role in offering his "suggestions" in court about sovereign immunity came to an end because their "application proved troublesome" and the President's decision-making was "often" tainted by "diplomatic pressure" and plagued by "political considerations." *Id.* at 487. Congress enacted the Foreign Sovereign Immunities Act ("FSIA") "to free" the process from the "diplomatic pressures" to which the Executive was historically vulnerable, *id.* at 488, and to which the Executive, ironically, clearly succumbed in issuing the very "determination" at issue here. The question of sovereign immunity is now decided by the Judicial Branch "on purely legal grounds" in accord with the Legislative Branch's "comprehensive set of legal standards." *Id. See also Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1100 (9th Cir. 1990) (Wallace, J.) (Congress enacted the FSIA to render Executive immunity "suggestions" non-binding because Executive decision-making was not "the rule of law"). Far from establishing a history of congressional acquiescence in unbridled Executive authority in foreign-policy litigation, the FSIA was enacted 30 years ago *to limit the discretion of the Executive* in this area.

The second example offered by the Petitioner and the Solicitor General is *Sanitary District v. United States*, 266 U.S. 405, 425-26 (1925), where this Court held that the President has inherent power to sue a political subdivision of a State even if no statute expressly confers such standing. *See* U.S. Br. 18-19; Pet. Br. 29, 33. Would that the President had followed the example set in that case. Here the President did not file a lawsuit asking this Court to interpret and apply the relevant treaty as the supreme law of the land. Instead, the President acted unilaterally, purporting to overrule a controlling decision of this Court interpreting that treaty (*Breard*) and to preempt Texas rules of criminal procedure on his own say-so.

Consider the reasoning behind the proposition advanced by Petitioner and the Solicitor General: because the President has standing to petition this Court for interpretation and enforcement of a treaty, the President can instead simply dictate the result he seeks and thereby preempt state law. They urge this reasoning on the Court even here, where the treaty, as ratified by the Senate and construed by this Court, expressly preserves those state laws and mandates treaty implementation "in conformity with" those laws. Thus would Petitioner and the President invade the legitimate provinces of the Article I Legislature, the Article III Judiciary, and the sovereign States. Rarely has the Executive attempted such a bold constitutional trifecta.

4. The President's qualifications to act in foreign affairs cannot override federalism or the Constitution's separation of powers.

Finally, the Solicitor General argues that the President is "uniquely suited," "best positioned," and "uniquely

qualified" to "respond expeditiously" to decisions of the ICJ. U.S. Br. 11-12; *see also* Pet. Br. 37. These points are pertinent to a discussion of how to divide government power in the first instance. *See, e.g.*, THE FEDERALIST NO. 70, at 472 (Alexander Hamilton) (J. Cooke ed. 1961). But they cannot provide a fulcrum for prying the separation of powers out of the Constitution's structure, nor for overriding the rule of law that the Senate actually ratified in the Vienna Convention, as authoritatively construed by this Court.

If the Solicitor General's "efficiency" argument sounds familiar, it is because this Court has heard it, and rejected it, so often. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 736 (1986) ("the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.") (citation omitted); *INS v. Chadha*, 462 U.S. 919, 944 (1983) ("Convenience and efficiency are not the primary objectives – or the hallmarks – of democratic government. . . . "); *United States v. Brown*, 381 U.S. 437, 443 (1965) ("This 'separation of powers' was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny."). Unsurprisingly, the President pressed this same "efficiency" argument in *The Steel Seizure Case*, where it was embraced by the dissent, *see* 343 U.S. at 690 (Vinson, C.J., dissenting), and, naturally, rejected by the Court. *See id.* at 613-14 (Frankfurter, J., concurring); *id.* at 629 (Douglas, J., concurring); *id.* at 649-50, 655 (Jackson, J., concurring).

Here, the Article I branch, in the form of the Senate, has ratified a treaty and thereby enacted the supreme law of the land for the President to enforce: the Vienna

Convention and its requirement that consular rights thereunder be implemented "in conformity with" the law of the forum state. And the Article III branch has given that law an authoritative construction. The Article II branch has no power either to legislate unilaterally a different rule that suits its needs, *see Clinton v. New York*, 524 U.S. at 445-46, nor to reverse this Court and render an interpretation of the treaty that is more to its liking. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Sanchez-Llamas*, 126 S. Ct. at 2684.

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted,

CHARLES J. COOPER
Counsel of Record
BRIAN STUART KOUKOUTCHOS
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
Counsel for Amici Curiae

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